



Australian Government
Department of Employment
and Workplace Relations

Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025

Submission of the Department of Employment
and Workplace Relations to the Senate Education
and Employment Legislation Committee

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Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025

Introduction

The Employment and Workplace Relations Portfolio acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respects to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

The Department of Employment and Workplace Relations (department) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee on the Fair Work Amendment (Protecting Penalty and Overtime Rates) Bill 2025 (Bill).

The Bill will protect penalty and overtime rate entitlements in modern awards to ensure they remain an enduring part of the modern awards safety net. It does this by seeking to amend the Fair Work Commission's (Commission) decision-making framework under Part 2-3 of the *Fair Work Act 2009* to:

- ensure specified penalty or overtime rates in modern awards cannot be reduced, and
- ensure modern awards do not include terms that 'roll-up' penalty and overtime rates into a single pay rate, where they reduce the additional remuneration from penalty and overtime rates, that award-reliant employees would have otherwise received.

Background

The Bill delivers on the Australian Government's 2025 election commitment to protect penalty rates in modern awards.¹

There are around 2.6 million award-reliant employees. Relative to all employees, award-reliant employees are more likely to be women (59.8%), work part-time (66.7%), be under the age of 35 (57.3%), and employed on a casual basis (48.3%).² Approximately 20.3% of all employees in Australia are paid at the applicable minimum wage rates in the 121 modern awards in operation.³ Commission analysis has found, noting that the award-reliant workforce is more likely to be part-time and lower paid, that the wages paid to the modern award-reliant workforce constitute only about 10.5% of the national 'wage bill'.⁴ For these workers, penalty and overtime rates and a strong minimum safety net form an important part of their take-home pay and economic security.

The election commitment responded to current award variation applications before the Commission seeking to introduce 'exemption rate' clauses in the *General Retail Industry Award 2020* (Retail Award), *Clerks – Private Sector Award 2020* (Clerks Award), and *Banking, Finance and Insurance Award 2020* (Banking Award). While not defined, the department understands exemption rate

¹Australian Labor Party, 'Labor will protect your weekend penalty rates from Dutton', 19 April 2025.

<https://alp.org.au/news/labor-will-protect-your-weekend-penalty-rates-from-dutton/>

² Australian Bureau of Statistics, Employee Earnings and Hours, May 2023.

³ Australian Bureau of Statistics, Employee Earnings and Hours, May 2023.

⁴ Fair Work Commission, *Annual Wage Review 2025 – Announcement of Decision*, 3 June 2025.

<https://www.fwc.gov.au/hearings-decisions/major-cases/annual-wage-reviews/annual-wage-review-2025>

clauses to include modern award terms that, either by agreement or automatically, exempt categories of employees at or above a certain classification or earning above a specified rate ('the exemption rate') from certain entitlements under the relevant award (often including penalty and overtime rates).⁵

The Retail Award, Clerks Award and Banking Award cover approximately 443,500 employees, which is 15.2% of all award-reliant employees. The Retail Award is the most commonly used award, covering 353,200 employees (12.1% of award-reliant employees).⁶

The Bill reflects the principles expressed in the written submission of the former Minister for Employment and Workplace Relations to the Commission in the Retail Award matter. The submission made clear the government's position that:

- a) The wages of low-paid workers should not go backwards.
- b) A fair and relevant minimum safety net of terms and conditions of employment is fundamental to sectors that are award-reliant, female-dominated, and low-paid.
- c) Penalty rates and overtime rates are an essential feature of minimum terms and conditions in modern awards and should not be reduced by variations to modern awards.
- d) Bargaining is the primary mechanism for trade-offs in terms and conditions of employment, where the impact on individual workers, and protections to ensure workers are better off overall, can be tailored to specific workplace requirements.⁷

Consultation

The department consulted with key stakeholders, including employer and employee associations, states and territories, the Commission and the Fair Work Ombudsman in developing the Bill. The *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector* (IGA) requires the Commonwealth to consult with the referring states and territories on proposed amendments to industrial relations legislation.

On 3 June 2025, the Minister advised a meeting of the National Workplace Relations Consultative Council (NWRCC) of the government's intention to legislate the election commitment. The NWRCC comprises of 15 members: 7 nominated by employer groups and 7 by the Australian Council of Trade Unions, with the Minister as chair (a full list of members appears at **Attachment A**). In addition, both the Council of Small Business Organisations of Australia and Minerals Council of Australia were invited representatives to this NWRCC meeting.

Confidential consultation on a limited exposure draft of the Bill was held on 2 July 2025 with state and territory officials and the Committee on Industrial Legislation, a subcommittee of the NWRCC. This consultation process ensured that stakeholder contributions and feedback were considered during the development of the Bill.

⁵ Fair Work Commission, 'Exemption rates', 10 December 2020. <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/am2020-103-exemption-rates.pdf>

⁶ Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2023.

⁷ Former Minister for Employment and Workplace Relations, Senator the Hon Murray Watt, 'Outline of Submissions', 21 February 2025, p 2, para 6. <https://www.fwc.gov.au/documents/awards/variations/2024/am20249-ors-sub-minister-210225.pdf>

Further detail regarding consultation on the Bill appears at **Attachment A**.

Policy Impact Analysis

The Australian Government Guide to Policy Impact Analysis requires an Impact Analysis (formerly a Regulatory Impact Statement) for any proposal with an expectation of compliance, that would result in a more than minor change in behaviour or impact for people, businesses or community organisations.⁸

The Office of Impact Analysis (OIA), part of the Department of the Prime Minister and Cabinet, is responsible for deciding whether the amendments proposed under the Bill require an Impact Analysis. The OIA considered that the proposed amendments did not meet the threshold for an Impact Analysis as described above. This is because the changes to be introduced by the Bill focus on the parameters of the Commission's decision-making powers and do not impose new obligations on employers, therefore, imposing no additional regulatory cost and no changes to regulatory impost.

See further information at the 'Impact on business' section below.

Discussion

Operation of the modern award safety net

Modern awards, the National Employment Standards and national minimum wage orders, are designed to form a fair and relevant safety net of minimum terms and conditions for national system employees. They establish a baseline of entitlements that underpin enterprise bargaining.

Modern awards were developed pursuant to the Award Modernisation Request by former Minister for Employment and Workplace Relations, the Hon Julia Gillard AC, to the then President of the Australian Industrial Relations Commission.⁹ In that request, the former Minister set out key principles in achieving a comprehensive set of modern awards. Relevantly, this includes ensuring that modern awards 'result in a certain, stable and sustainable modern award system for Australia'.¹⁰

The Commission is responsible for setting modern awards terms. In doing so, it must apply the modern awards objective at s 134(1) of the Fair Work Act, which requires consideration of a range of factors, relevantly including:

- a) the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays, or shifts (s 134(1)(da)).
- b) relative living standards and the needs of the low paid (s 134(1)(a)).
- c) the need to encourage collective bargaining (s 134(1)(b)).
- d) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s 134(1)(h)).

⁸ Australian Government Guide to Policy Impact Analysis. <https://oia.pmc.gov.au/resources/guidance-impact-analysis/australian-government-guide-policy-impact-analysis>

⁹ Former Minister for Employment and Workplace Relations, the Hon Julia Gillard, 'Request under s 576C(1) – Award Modernisation Consolidated Version', 26 August 2009. https://www.fwc.gov.au/documents/awardmod/request_cons_121109.pdf

¹⁰ Ibid, Objects - paragraph 1(e).

In addition, the Fair Work Act provides that modern awards may include terms about overtime rates (s 139(1)(d)) and penalty rates (s 139(1)(e)).

Key elements of the Bill

The Bill would preserve existing penalty and overtime rate entitlements by inserting new s 135A in Division 2 of Part 2-3 of the Fair Work Act. This provision establishes a clear principle that, in exercising its powers to make, vary, or revoke modern awards, the Commission must ensure penalty and overtime rates are not reduced or substituted in a way that diminishes the additional remuneration any employee would otherwise receive.

Paragraph 135A(1)(a) of the Bill would prohibit future reductions to penalty and overtime rates in modern awards, which are generally expressed as a percentage rate based on the employee's minimum or ordinary rate of pay.

Paragraph 135A(1)(b) of the Bill would require the Commission to exercise its discretion when considering terms that substitute penalty and/or overtime rates for a single rate of pay, to determine whether the term is set in such a way that protects the additional remuneration any employee would otherwise receive. The Bill will not disrupt or prevent the inclusion of award terms that the Commission considers adequately protect the additional remuneration any employee is entitled to receive.

The Bill does not amend s 139(1)(f) of the Fair Work Act, which allows for annualised wage arrangements which require employers to reconcile an employee's wage with their entitlements to ensure they are not financially worse off.

At the individual level, s 135A(2) of the Bill preserves the operation of individual flexibility arrangements under s 144 of the Fair Work Act, which allow employers and employees to vary award terms to meet genuine business and employee needs, provided the arrangement does not leave the employee worse off than under the award terms.

Section 135A(2) of the Bill confirms the Bill does not affect the Commission's powers under s 160 of the Fair Work Act to vary modern awards to remove uncertainty, ambiguity or correct errors.

For clarity, s 135A(3) of the Bill confirms that it will not require the Commission to initiate a review of all modern awards to determine whether the new principle applies or not, to review award terms outside the scope of an application before it, or to exercise its powers to make, vary or revoke modern awards, thus preserving the Commission's independence.

The Commission is the independent workplace relations tribunal responsible for administering modern awards. This Bill maintains that role and the Commission's role to interpret and apply the principle in a way that is appropriate and fair in the circumstances. The modern awards objective will remain as a mandatory consideration of the Commission in any modern award matter.

The Bill will not apply retrospectively, which means that if the Commission makes a decision on the current award variation matters before the Bill is passed, those decisions will not be overridden by passage of the Bill. Existing award arrangements will also continue to operate following passage of the Bill.

The Bill will apply prospectively from commencement in relation to the Commission's exercise of its powers to make, vary or revoke modern awards, including in relation to:

- a) Applications that are on foot but are not yet decided, seeking to introduce exemption or salary absorption rates into modern awards.
- b) Own-motion proceedings brought by the Commission or applications made by parties about terms that s 135A applies to.

Tailoring arrangements outside modern awards

Modern awards provide a minimum safety net of terms and conditions for some of Australia's lowest paid workers based on their industry or occupation. A fair and relevant minimum safety net of terms and conditions, that is "certain, stable and sustainable", consistent with the Award Modernisation Request,¹¹ is fundamental for all sectors but particularly those which are award-reliant, female-dominated and low-paid.

There remain multiple appropriate avenues for employees and employers to tailor terms and conditions of employment that suit their specific circumstances.

Enterprise bargaining is the primary method through which employers and employees (and their representatives) tailor their employment terms and conditions to their workplace. These agreements are subject to oversight by the Commission, including the better off overall test to ensure employees are better off compared to their relevant modern award. Bargaining options include single enterprise agreements, multi-enterprise agreements and greenfield agreements for new businesses. As of 31 March 2025, almost 2.7 million employees were covered by a current federal enterprise agreement.

Employers and employees will still be able to enter into employment contracts that offset above-award pay rates against award entitlements. Such arrangements must continue to comply with relevant obligations under the Fair Work Act, any applicable modern award and the common law. Employees must not be paid less than they would receive under the applicable award.

Impact on business

Consistent with the Australian Government's Policy Impact Analysis framework, the department assessed the impacts of this reform on Australian individuals and businesses. Through this assessment process, the department determined there would be no change to regulatory impost for employers, including small businesses (those with less than 20 employees) who employ around 30.5% of award-reliant employees.¹²

Under the modern awards framework, employers currently have an ongoing responsibility to pay penalty and overtime rates to employees in accordance with the applicable modern award. The Bill does not impose new obligations on employers in addition to this ongoing responsibility.

¹¹ Request from the former Minister for Employment and Workplace Relations, 'Request under s 576C(1) – Award Modernisation Consolidated Version', 26 August 2009.

https://www.fwc.gov.au/documents/awardmod/request_cons_121109.pdf

¹² Australian Bureau of Statistics, Employee Earnings and Hours, May 2023.

As detailed above, the changes introduced by this Bill will not apply retrospectively. Employers' current operations, including terms in modern awards that already provide for a 'rolled up' pay arrangement will continue after commencement.

The Bill impacts the parameters of the Commission's decision making when exercising its power to make, vary or revoke modern awards. It will be a matter for the Commission to determine how the principle is interpreted and applied in practice to any future award variation process, through its usual consultative processes where employer representatives and unions will have the opportunity to present their views.

Attachment A – Consultation

The department consulted with senior officials of the states and territories, in accordance with the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation (CoIL) on the draft legislation.

CoIL is a sub-committee of the National Workplace Relations Consultative Council (NWRCC). The NWRCC provides, in the public interest, an organised means for senior representatives of the Australian Government, employers and employees to consult on workplace relations and work health and safety matters of national concern. The NWRCC comprises 15 members (7 nominated by employer groups, and 7 by the Australian Council of Trade Unions), with the Minister for Employment and Workplace Relations as Chair. Current NWRCC members are listed in the table.

#	Name and Organisation
1.	The Hon Amanda Rishworth MP, Chair
2.	Ms Sally McManus, Australian Council of Trade Unions
3.	Ms Michele O’Neil, Australian Council of Trade Unions
4.	Mr Liam O’Brien, Australian Council of Trade Unions
5.	Mr Joseph Mitchell, Australian Council of Trade Unions
6.	Ms Annie Butler, Australian Nursing and Midwifery Federation (ACTU seat)
7.	Mr Gerard Dwyer, Shop, Distributive and Allied Employees Association (ACTU seat)
8.	Ms Jo-anne Schofield, United Workers Union (ACTU seat)
9.	Mr Innes Willox AM, Australian Industry Group
10.	[vacant] Australian Chamber of Commerce and Industry
11.	[vacant] Australian Chamber of Commerce and Industry
12.	Ms Tara Diamond, Australian Resources and Energy Employer Association (ACCI seat)
13.	Ms Wendy Black, Business Council of Australia
14.	Ms Denita Wawn, Master Builders Australia
15.	Mr Troy Williams, National Farmers’ Federation

When a CoIL is convened, the department provides an invitation to NWRCC members so that they may nominate their participants. An invitation is also provided to the Council of Small Business Organisations of Australia, due to its important role in representing small business.

Where a NWRCC membership is vacant, an invitation to a NWRCC meeting or CoIL is sent to the head of that organisation so that they may nominate their participants.

On 2 July 2025, the department conducted two separate virtual consultation sessions with state and territory workplace relations officials and CoLL. The department sought technical and policy feedback, and participants were given the opportunity to respond, including providing further written comments following the virtual consultation sessions.

The department separately consulted the Fair Work Commission and the Fair Work Ombudsman.